SUPREME COURT OF APPEALS OF VIRGINIA.

Sept. 11, 1916. Rehearing denied Nov. 23, 1916.

WHEAT *v.* WHEAT.

Appeal from Circuit Court, Bedford County.

Nelson Sale, of Bedford City and *S. V. Kemp,* of Lynchburg, for appellants.

Don P. Halsey, of Lynchburg, and *Landon Lowry,* of Bedford City, for appellees.

PER CURIAM. Affirmed by divided court.

[NOTE.—There being no opinion by the Supreme Court that of the Circuit Court is reproduced in full.]

In the Circuit Court of Bedford County.

July Term, 1915.

1. Wills—Necessity for Presence of Both Witnesses When Will Acknowledged.—A will is invalid where the two subscribing witnesses were not together at the same time when the will was acknowledged by the testator.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 736.]

2. Specific Performance—Wills.—A suit for the specific performance of a contract to make a will does not lie in Virginia.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1140.]

3. Specific Performance—Oral Contract—Defense.—The fact that the plaintiff in a suit for the specific performance of a parol agreement to convey lands to him in consideration of his taking care of decedent and wife, was and is willing to perform his part of the agreement whether or not he is successful in the suit can not be urged as a defense against him.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 547.]

4. Statute of Frauds—Contract for Sale of Land—Specific Performance.—Virginia court's are very stringent in their adherence to the statute of frauds, and allow the rule which requires a contract for the sale of land to be in writing, to be varied by parol agreements only under exceptional circumstances. But there are exceptions to the rule, and under certain conditions the statute is set at naught, and the parol agreement established as the contract of the parties.

[Ed. Note.—For other cases, see 12 Va.- W. Va. Enc. Dig. 537, 559.]

5. Frauds, Statute of—Object—Prevention of Fraud and Perjury.—The object of the statute of frauds is to prevent frauds and per-

juries, and not to perpetrate them, and the statute is never enforced when by the effect of it a fraud and a wrong would be perpetrated.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 532.]

6. Husband and Wife—Right to Services and Wages of Wife.—The husband is entitled to the services of the wife and if she works for another he may collect her wages.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 215.]

7. Specific Performance—Statute of Frauds—Avoidance—Part Performance.—The principles upon which courts of equity have avoided the statute of frauds upon the grounds of a part performance of a parol agreement are well established. The parol agreement relied on must be certain and definite in its terms. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party and place him in a situation which does not lie in compensation. Where these three things concur, a court of equity will decree specific performance; where they do not, it will turn the party over to seek damages in a court of law.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 541.]

8. Wills—Presumption as to Will Not Found at Testator's Death.—A will known to have been in the testator's possession and not found after his death, is presumed to have been intentionally destroyed by him.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 1277.]

9. Specific Performance—Statute of Frauds—Admissibility of Evidence.—A defectively executed will though insufficient as a complete memorandum of a contract sufficient to take the case out of the operation of the statute of frauds may be considered by the court for the purpose of proving the contract and granting specific performance thereof.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 540.]

10. Specific Performance—Damages in Lieu of.—The cases in Virginia favor the rule that damages should always be given where it can be done in lieu of specific performance, but there are many exceptions to the rule, as where services rendered can not be compensated in damages and where the contract shows that the parties did not contemplate any other form of payment than the transfer of land.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 677.]

11. Specific Performance—Necessity for Possession of Property.—Possession of property is usually a requisite of specific performance, but where the part performance of an oral agreement to convey lands consists of personal services of such a peculiar character that it is impossible to estimate their value by any pecuniary stand-

ard, the contract can be specifically performed, whether the plaintiff be in possession or not.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 551.]

12. Specific Performance—Part Performance Not Sounding in Damages.—Personal care and attention and support of an aged and infirm couple is such part performance of an oral agreement to convey land as can not be adequately compensated in damages and is sufficient to remove the contract from the operation of the statute of frauds. If the performance of the contract involved the abandonment by the plaintiff of his previous home or business, his equity is so much the stronger.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 547.]

13. Specific Performance—Inadequate Remedy at Law.—Specific performance of a contract will be enforced where adequate compensation can not be had at law. There are some services that are incapable of valuation in money, such as personal services rendered in caring for aged and infirm persons; as to these matters the law permits individuals to make their own contracts.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 595.]

14. Specific Performance—Case at Bar.—Where a testator agreed to give his farm to a relative in return for the care and support of himself and wife during their lives and the will was invalid for want of statutory formality in its execution and the relative had fulfilled his obligation up to the testator's death it was held that this entitled him to a conveyance of the land charged with the support of the testator's widow during her life.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 543.

DILLARD, J. This is a suit in Chancery brought by James A. Wheat in the Circuit Court of Bedford County, against the administrator and heirs of Aaron J. Wheat, deceased, asking for the specific performance of an alleged parol agreement between James A. Wheat of the one part, and Aaron J. Wheat, in his lifetime, of the other part, by which James A. Wheat was to work for, take care of and provide for Aaron J. Wheat for the balance of his life, and to take care of his wife, Kate Wheat, as long as she should live. Aaron Wheat had no children or family of any kind except his said wife, and left as his heirs at law and distributees, his brother, Davis Wheat, and sister, Mrs. Fannie Key.

Judging from the evidence in the case, there was not much affection between the said Aaron J. Wheat and his brother and sister. In his attempted will, which is filed as an exhibit in this cause, he utterly ignored them, and after disposing of his property by giving all of it to his wife for life, with the permission for James A. Wheat to have the home place after her death, he directs that when she dies the other property should go

to charitable or religious purposes. This brother and sister of Aaron are conspicuously absent and wanting in attendance to him during the various years of his life when he was advanced in age, afflicted and helpless and needing care and attention which only loving hands and kindly hearts could give him. It is clearly proved that for a period of seven years, commencing in 1905, and terminating on the 28th of October, 1912, the date of his death, this old man, who was fast approaching his three-score years and ten, was sorely and hopelessly afflicted by the incurable disease of his heart, and that during the greater period of this time he needed constant, affectionate and considerate care and attention, such care and provision as alone can be brought about by mutual love and affection between the parties. He needed, in fact, just such care and attention as a child would give his parent in waiting upon him and attending to his needs and wants, and doing things for him that would not be ungrudgingly done by other people.

James A. Wheat was a cousin of Aaron J. Wheat, and his wife a great-niece of Mrs. Kate Wheat. James Wheat went to live with Aaron J. Wheat when he was seventeen years of age, and stayed there nearly all of 27 years, going away, it is true, at intervals, but always returning at the request of old man Aaron. He had in fact spent his young manhood and the prime of his life in devoted service to Aaron Wheat. That he has always been faithful, kind and considerate and that Aaron Wheat needed him and wanted no one else, and could not do without him, is abundantly shown by the proof in the cause, and the conduct of Aaron Wheat up to the time of his death. Jim was to Aaron a devoted son, or stood in the place of such. Aaron was very fond of him, and had unbounded confidence in him, appreciated his kindness and said he could not do without him. He was a man of considerable means, Aaron Wheat was, and when he felt the need of kindly attention and services, brought about by love and affection to himself, as he was slowly going down to the sod where he now rests, he had a right to use his means to soothe his dying hours and provide needful wants for himself and his aged wife, both of whom were at times bedridden, and required the attention day and night of both James Wheat and his wife. He secured the services of James Wheat as a man of all others to come into his family and make it his home and do for him as he has done, and he had a perfect right to do so, and he was fortunate in his choice. The old man had tried other people, but hirelings did not suit him in his needy and dependent circumstances. He wanted somebody in whom he had confidence, upon whom he could rely, who had shown by his whole life that he loved him and would always come at his

beck and call. Under these circumstances, James Wheat was brought there in December, 1909, by Aaron Wheat and his wife, and remained there until the end came on the 26th day of October, 1912.

James had found out, after he married, that with his increasing family he could not work for his cousin for the paltry wages of $175.00 a year that he was receiving, and more than once he went away. Finally he went and bought him a piece of land with a view of making a home for himself, his wife and children, but soon, in less than a year, at the importunity of Aaron, he broke up the home and took his wife and went back to Aaron Wheat, and again undertook the arduous task of taking care of this old man and his invalid wife. He remained there until about the first of the year 1909, when seeing and knowing that his first duty was to his wife and children, he took them, and went to the far-away State of Missouri, where he could get better wages, and where he could be in close touch with the relatives of his wife, who lived there. He settled down in Missouri, working for wages, but looking around him in the meantime for a home, but, before the year expired, old man Aaron back in Virginia, who was gradually growing worse, his wife having become blind and unable to help him, and at times as much of an invalid as he was, again appealed to Jim to come back to Virginia, that he could not do without him, that he needed him, and that he would make for him satisfactory arrangements after his return. Jim Wheat, responsive to the appeal of his kinsman, and doing as he had been doing for years, laid aside every consideration of personal interest, broke up in Missouri, took his wife and children, paid his own expenses, came back to Virginia, and arrived at Aaron Wheat's on the 24th of December, 1909. The hired man who had signally failed to come up to the needs and requirements of old man Aaron's household, left the next day after Jim got there. Jim and his wife took charge of everything. Jim worked, farming the land and making a living for the whole family while his wife was indoors constantly and faithfully attending to the domestic and household duties.

Aaron Wheat was greatly relieved when James Wheat came back in January, 1910. It was proved clearly and distinctly by the evidence of Dr. Johnson, the family physician of Aaron Wheat, that Aaron was very solicitous and talked a great deal about making arrangements for James Wheat. He said he had heard him say time and again that he had agreed with James Wheat that "Jim was to work the farm and the home place, take care of him and his wife, Kate, as long as they should live, and that he was to either deed or will James A. Wheat the

home place," upon which he then resided. Dr. Johnson said he advised Aaron Wheat to make a will and give his place to Jim, because the will could be changed, if there was any failure on the part of Jim to comply in the future, but that if he made a deed, he could not change it. Aaron then requested him to write his will, told him to take the pen and write down just what he said, and he did so. This paper, after being copied by a neighbor, was witnessed by Dr. Johnson and Otho Wheat, and signed by Aaron Wheat in his own proper handwriting, but, unfortunately, the two witnesses were not together at the same time, when the will was acknowledged by said Aaron Wheat, consequently, the paper was invalid as the last will and testament of Aaron Wheat. But one thing is very certain: Aaron Wheat thought it was his last will and it was an acknowledgment in writing by him that so far as he was concerned, Jas. A. Wheat had faithfully carried out his agreement. If he had not thought so, he would certainly have changed the will before he died, as he knew he had the right to do from his conversation with Dr. Johnson. But instead of changing it, he constantly approved of it, and told some of his friends in the neighborhood that he had made arrangements for James Wheat. In fact, he took the paper in his hand, after it was written, and acknowledged it, and said, "This will covers the agreement that I had between Jim and myself. I promised him the home place and now this will fills the agreement." This will was to fill the contract between Mr. James Wheat and Mr. Aaron Wheat. Again he says, "I have brought him (Jim) into my house. I want him to stay there to take care of me. I will see that he does not lose anything, and that the arrangements are all right. I want him to take care of me and Kate."

But it is strenuously argued and with a great deal of force that the will is not such a memorandum in writing as is required by the statute to take the case out of its operation. That the will states a different contract from that relied upon in the parol agreement between Aaron Wheat and James Wheat. It is very true that you cannot have a suit for the specific performance of a contract to make a will. This is a clearly settled law in Virginia, and is not contended for here. When Aaron Wheat wrote this will he did not *give* his property, his home place, to James Wheat, but he only wanted him to have it, provided that he took care of Kate as long as she should live. This was not all of the contract. It is true that he was to take care of Aaron also, but he has done this, for the will is an admission that so far as he is concerned, the terms of the contract had been complied with and he died admitting this fact, because he didn't change the will, and he knew it would not take effect

until he was dead. It was by no means a gift on the part of Aaron Wheat to James Wheat. He put upon James Wheat the arduous duty of carrying out the balance of his contract by *taking care of* an old lady, nearly blind, growing day by day more helpless, more dependent, more needful of the provision which her husband died thinking he had made for her. The will may not be a memorandum of the contract, but it certainly must have reference to the contract, because there was some consideration, either valuable or meritorious, in its nature which would induce Aaron Wheat to give this valuable farm to James Wheat to the exclusion of the brother and sister. The task imposed upon him by the paper itself to take care of this old lady as long as she should live, refutes the idea of giving. The life estate in her does not affect James Wheat's right at all, because the whole of the land in James Wheat's hands and possession is charged by the very terms of the paper and of the parol agreement with the care of this old woman, who is still living, and is being cared for by James Wheat, whether he prevails in this suit or not. It is also insisted that because James Wheat is willing now, and has been willing all of the time to do what he has done for Aaron and his wife, whether he gets the property or not, that this, in itself, would prevent his recovery, because it cannot be a fraud upon him if he is willing to do it anyway. If this position was sound, there never would be a case in which there could be recovery against the statute of frauds and perjuries, because always the meritorious consideration, the inducement, the willingness of a party to perform what James Wheat and his wife performed and underwent for these old people, brought about by love and affection, and willingness to do those things which the hired men failed to do for Aaron Wheat and his wife, are the requisites of the agreement. I am well aware of the fact that the Virginia courts are very stringent in their adherence to the statute of frauds and perjuries, and allow the rule which requires a contract for the sale of land to be in writing to be varied by parol agreements only under extraordinary circumstances. But there are exceptions to the rule, and there is not a case in Virginia, or elsewhere, that I can find, which does not recognize the fact that, under certain conditions, the statute is set at naught, and the parol agreement established as the contract of the parties. The object of this statute, says the court, is to prevent fraud and perjury, and not to perpetrate them, and the statute is never enforced when by the effect of it a fraud and a wrong is to be perpetrated. There certainly is no perjury in James Wheat's claim. Everybody admits that he lived up to his contract in good faith, and that the man, with whom he made the contract, has shown this by his will, and recognized his right to the home place, and died believing it was his.

Now let's look at the effect of the refusal on the part of the court to execute this contract, and not give Jim Wheat the land devised him by the will. First, how does it affect Aaron Wheat? His greatest anxiety and solicitude was for his wife, Kate Wheat. He made a provision for her. He placed her above want. He put her in the hands of a man whom he loved and he had confidence in, and who, it is shown all the way through the transaction, deserved his confidence; that Kate Wheat was to be provided for by James Wheat, and the old man died feeling assured that she was in safe hands. But now come his brother and sister claiming his property, and leaving this widow, old and blind, and you may say penniless, because of a technical defect made by her husband in his honest efforts to provide for her. It is true she would have dower in his real estate (there seems to be no personal property), but how could this old woman *be taken care of and provided for* by being a life tenant in the lands of her husband? Who is there to look after her when she is sick, to watch by her bed-side at night when she is needful, and to hold the staff that she walks by when she is blind? James Wheat was the man that old man Wheat thought he had left for this purpose, but, alas for the old lady, in the future she will have to rely upon charity and the strong arm of Jim Wheat and the kind heart of his wife, which they say they will give her anyway, under all circumstances, unless the law enforces the contract. Thus, I say, it would not be fair and just to old Mr. and Mrs. Wheat to deprive her of all these kindly provisions which her husband has made for her.

Secondly, how does it affect James Wheat? When he was a boy about seventeen years of age, he went there to Aaron Wheat's to live, more than a quarter of a century. He either lived there as a hireling, or as a member of the family with the whole burden of responsibility of taking care of Aaron Wheat and his wife and his own family upon him.

It is true when he was there for wages he didn't earn the right to the property thereby, but his living there gave Aaron Wheat an insight into his character and led up to the results which followed. Aaron Wheat learned to know this boy was reliable, that he could depend upon him, and when he became old and infirm, and needed him to take the place of a son, he gladly embraced the opportunity of having Jim to do for him. Jim made a little money as a day laborer before he had the burden of a family, and bought a little farm, but it is all gone. He is to-day a man up in the forties, and though the proof shows that he has been industrious, frugal, sober and attentive to business, he is penniless. What little substance he had has been consumed in providing for clothing and other expenses of his family, outside

of bread and meat, which he made himself upon the farm while he and his wife were there laboring for and taking care of Aaron Wheat and his wife.

It has been stated that every time James Wheat would get off to himself with a view of making a start in the world, he yielded to the entreaties of the old man and went back to him. The last time he went, however, he told him that he could not work for wages, and the old man readily agreed to it.

After the old man's death it is proved by one of the witnesses for the defendants that Jim didn't have any money, and could not trust him for a little hay which he wanted to buy, because he needed the small amount it would bring for his daily uses. His land had been sold and doubtless used in his expensive trip to and from Missouri, and otherwise while he was at Aaron Wheat's farm the 1st of January, 1910, to the end of the year 1912, during all of which time he worked uncomplainingly, both in the day and night, doing things which do not sound in damages, which money cannot pay for; which the parties do not contemplate being paid in money, not only Jim Wheat, but his wife, for which he never received a cent. It would be idle to say that he would live there with these old people constantly using what little surplus he had and not claiming any wages, unless he was relying upon the contract which he had with Aaron Wheat. It is, however, argued that because Mrs. Wheat assisted him in taking care of these old people, that she should be made a party to this suit, and that would not be the contract relied upon. To this contention, I cannot accede. It is plain to my mind that Mrs. Wheat's assistance to her husband went to show the burden of his undertaking. It was more than one man could do, and his wife very naturally was called upon to help him. And even if she were entitled to wages, the husband is entitled to the services of his wife, and surely he can command them in the way of assisting him in carrying out his contract; he could collect the money for her wages if she worked for somebody else. But I do not care who James Wheat got to assist him, if it was necessary for him to do it, and it was his duty to do it, and he deserves more credit.

There is some evidence here for the defendants pretending to prove some declarations of Aaron Wheat that he did not tell Jim to leave, and did not ask him to come back, and other declarations of his. This evidence is not excepted to and has to be considered by the court and given due weight. But even if Aaron Wheat made those remarks, they are utterly inconsistent with his conduct and actions in regard to this matter. He might have said these things for the purpose of misleading people who would have an interest in his property after his death; but what-

ever reason may be assigned, the truth of his declaration is not established when you read the evidence in the case, but, on the contrary, are completely refuted. It seems that the principles upon which courts of equity have avoided the statute of frauds upon the ground of a part performance of a parol agreement are now as well established as any of the doctrines of equity jurisprudence. The parol agreement relied on must be certain and definite in its terms. The acts proved in part performance must refer to, result from, or be made in pursuance to the agreement proved. The agreement must have been so far executed that a refusal of full execution would operate as a fraud, upon the party and place him in a situation which does not lie in compensation. Where these three things occur, courts of equity will decree specific performance. Where they do not, they will turn the party over to seek damages from the court of law. This doctrine is laid down in Wright *v.* Pucket, 22 Grattan, 370, and is adhered to and recognized down to the case of Milton *v.* Kite, 114 Va. 256. There are many cases in Virginia bearing upon this question, but these three principles, above laid down, are recognized by them all, and one case is not authority for the other, because, under these established principles, the evidence in each case is considered, and it being different from another case naturally brings about different results. All of the Virginia cases and many others are referred to by counsel in their briefs, both for the plaintiff and defendant, and many other authorities in support of their opposing views. Let us apply the principles as laid down by all of these cases in Virginia to the case under consideration.

First, is the parol agreement, relied on, certain and definite in its terms? No one can read the testimony of Dr. Johnson, S. R. Watson, J. E. Wood and B. F. Key, and last but by no means least, the attempted will of Aaron Wheat, in which he states that James Wheat is to have the home place, upon which he resides, provided he took care of Kate as long as she lived, without concluding that the contract is clearly and definitely proved. There is no claim here that this is a pretended agreement to uphold a false claim against the dead man's estate. The will itself which the intestate died believing was valid goes to show the existence of the contract as proved by the evidence of the witnesses. It is perfectly clear that Aaron Wheat wanted James to have the home place, and when he died, he thought it would go to him.

Second, the acts proved in part performance must refer to, result from, or be made in pursuance to the agreement proved.

As stated above, it would be silly to contend that James Wheat would decline to come back to Virginia and work for

wages, and then come back and work for nearly three years in the day and in the night, doing services that Aaron Wheat could not get others to do, and spend all of the savings of his life in providing for his family, and not ask for or receive the wages for which he was working. The proof is conclusive that James Wheat received no wages from January, 1910, to the 26th day of October, 1912. This is the evidence of various witnesses. It is an oft repeated declaration and assertion of Aaron Wheat that Jim was not working for wages; that he had made other arrangements for his pay. That Jim did this work for Aaron Wheat as the result of his contract is also clearly established. The fact that he received no wages seems to me to be conclusive of the matter; but after he went to work his anxiety about being secured in the contract was told to Mr. Aaron Wheat, and the old man said that he should be taken care of; that he would at once make his will or a deed by which the provisions of the contract should be carried out. And on the 2nd day of February, 1910, in pursuance of his contract, he made the writing and signed and acknowledged it before two witnesses, and proclaimed it to be the fulfillment of his contract with Jim. The evidence is that after he made the will, Dr. Johnson informed Jim Wheat of the fact, and Jim faithfully and assiduously worked in fulfillment of the same. This will may not be considered a sufficient memorandum in writing to take the case out of the statute of frauds, but it certainly should be considered by the court in arriving at a just conclusion in this case. He thought it was his will, and it is certainly a writing which may help to prove the contract relied upon, so the case is not wholly dependent upon parol evidence. True, this writing is void as a will, but it did not prevent it from being good to help prove the contract. This seems to be recognized as correct principle in the case of Milton *v.* Kite, supra. In the last named case, the will of old Mr. Brown was made by him, and handed to his daughter with instructions to take it and take care of it. However, he subsequently took the will away from her and it was lost and never probated. Yet with the presumptions of the law that a will known to have been in the previous possession of the testator and not found at his death is presumed to have been intentionally destroyed by him, this will was considered by the court, and mentioned by the president of the court, as a strong reason for the enforcement of the parol agreement relied on.

This is quite coincident with the action of Aaron Wheat when he wrote his will

In the Georgia case of Maddox *v.* Rowe, 68 American Decisions 535, where a verbal agreement to convey land was upheld upon the ground of part performance, and as in this case, a will

made in pursuance of the contract was refused probate for want of a sufficient number of witnesses. This case is referred to by counsel for the plaintiff in his brief. The case of Hale *v.* Hale, 90 Va. 728, is referred to by both sides. The court there refused to allow parol evidence to establish the fact that Mrs. Berkely's will and Mary D. Hale's will were made, the one agreeing to give the other her property, and this was not effected by the fact that Mrs. Berkeley died believing her will valid, though the same had been ipso facto abrogated by her marriage. That case is very different from this. There was no contractual relation between the parties, no meritorious consideration, no continuous care, labor, solicitude and waiting on, but simply a gift, pure and simple. It was absolutely no fraud upon Mary D. Hale to refuse to allow parol evidence in that case to prove the agreement, because the agreement was without consideration, and she was left in statu quo as to her own property, and upon the death of Mrs. Berkley, or even before, she had a perfect right to change her will. The case referred to here approvingly, of Mattison *v.* Alderson, which seems to be authority against my views in this case, is similar in some respects to this. It was a will made by a man to get a woman to serve as housekeeper without wages for many years, and to give up other prospects in life by a verbal promise on the part of the man to make a will and leave her a life estate. He made the will, but the same was not duly attested, as in this case. The court there held that although the woman had performed her part of the contract by serving the intestate until his death without wages, yet her services were not unequivocally and in their own nature, referable to any contract and were not such a part performance as should take the case out of the operation of the statute of frauds. The will did not refer to the contract at all in that case, and the proof rested entirely upon the plaintiff, who seemed to be the sole witness. The criticism of the case made by counsel for the defendant is made a part of the opinion, and seems to show conclusively to my mind that the same can be clearly differentiated from the matter now under consideration.

It is useless for me to discuss the various cases on this subject in Virginia, because the law, as laid down by them all, is just alike. So it seems from the evidence in this case that James Wheat came back to Virginia from Missouri under the persuasive influence of Aaron Wheat, on the 25th day of December, 1909; that he immediately went to work, and Aaron Wheat said he had brought him back home and he wanted him to stay there, and he did stay there, he and his wife, as shown by the evidence, working the farm and making a support not only for themselves,

but for Aaron Wheat and his wife; that without them, these two helpless old people would have been in a pitiable condition; and that they remained there until his death in 1912, October 26th, working for the fulfillment of the agreement by which they were to have a home, which they had so much sought and which they had been prevented from obtaining, probably twice before, on account of the importunities and needs of Aaron Wheat and his wife.

Third, the agreement must have been so far executed that the refusal of full execution would operate as a fraud upon James Wheat and place him in a situation which does not lie in damages. I am aware of the fact that the tendency of the cases in Virginia is to the effect that damages should always be given where it can be done in lieu of specific performance, but there are many exceptions to this rule. In fact, the very nature of this case refutes the idea of damages or wages. It was neither in contemplation by James Wheat, nor by Aaron Wheat. Somebody necessarily had to do these services for Aaron Wheat and his wife that are described in the testimony of the witnesses, and Aaron Wheat certainly had a right to have the man of his choice to do them, and fix his compensation. He had promised or agreed that James Wheat would no longer work for wages, but that the home place should be his, provided he took care of Kate after the old man was gone. The contract, so far as he was concerned, having been fully complied with, and being executory in its nature, the possession of this property did not vest in Jim, but remained in the old man until he died.

Possession of property is usually a requisite of specific performance, but it seems to me to be sound that services of the character done in this case, constitute such specific performance as to justify the enforcement of the contract, whether the plaintiff was in possession or not. The law is so stated in reference made by plaintiff's counsel in Volume 36 of Cyc., 673-674, and is as follows:

"Certain kinds of services of a very personal nature have been recognized by a clear majority of the American cases as a sufficient act of part performance, unaided by possession or other acts on the plaintiff's part. Where the services rendered are of such peculiar character that it is impossible to measure their value by the pecuniary standard, and where it is evident that the parties did not intend to measure them by any such standard, it is impossible, adequately, to compensate the party performing the services, except by a decree for specific performance.

"A contract to care for, give personal attention to, and make a home for an aged person, whether a relative or stranger, in

return for a promise of a testamentary gift or devise, is a common form of such contract, and if the performance of the contract involved the abandonment by the plaintiff of his previous home or business, his equity is so much the stronger."

This quotation seems to embody the law on the subject. Case of Bryan *v.* McShane, a West Virginia case, 49 L. R. A. 527. The following quotations from the case will show clearly the views of he West Virginia court on this subject:

"Specific performance can be enforced in a case of this character without regard to possession. In the case of Brinton *v.* Cott, 8 Utah 480, 33 Pac. 218, it is held that, 'where the part performance of an oral agreement to convey lands consists in the performance of services of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, the contract can be specifically performed, even though possession of the land agreed to be conveyed was never in the vendee.' Rhodes *v.* Rhodes, 3 Sandf. Ch. 279; Watson *v.* Mahan, 20 Inc. 225. This is a rule generally accepted. Browne, Statute of Frauds, § 463, note 2. Some jurisdictions refuse to recognize it, notably Indiana. Austin *v.* Davis, 128 Ind. 472, 12 L. R. A. 120, 26 N. E. 890. This rule is but the general doctrine of equity that specific performance of a contract will be enforced where adequate compensation cannot be had at law, and that persons who contract to perform peculiar services, for peculiar compensation, having performed such services, are entitled to have the compensation contracted for, and to enforce a different value on their service, and to compel them to accept a less compensation for them, would be the perpetration of fraud and injustice against them. There are some services that are incapable of valuation in money. As to these, the law permits individuals to make their own contracts."

Thus it seems to me that it would not only be a fraud upon James Wheat under the evidence in this case to refuse to execute the contract between himself and Aaron Wheat, but it would be doing Mrs. Kate Wheat an irreparable wrong, and arbitrarily to take from her the provision which her husband affectionately and thoughtfully made for her before he died. Aaron Wheat wanted James Wheat to have this land, or he would not have said so, and he wanted his wife to be taken care of by James Wheat, or he would not have said so. He had no children to look after their mother when he was gone, and it is not my intention to defeat his wishes relative to this matter.

There are very many exceptions to the depositions taken since the filing of the amended bill. In fact, practically every thing is excepted to, counsel seeming to think that the court had no right to allow the filing of said bill. But there was a demurrer

to the original bill which was argued vehemently in writing should be sustained, and it was sustained by the court. While the evidence had been taken, and the case submitted on its merits on the original bill, yet the court could not consider that evidence until a proper bill had been filed for the purpose. The exceptions to the competency of this testimony is overruled. It is not necessary for the court to pass upon the competency of Mrs. Kate Wheat as a witness in this case, because without her evidence, its judgment would be the same. Same as to James Wheat and wife. There may be a decree in this case appointing a commissioner to convey what is known as the home tract of land of Aaron Wheat, and described in the within bill, to James A. Wheat, the same to be charged, however, with the condition that he take care of and provide for Kate Wheat as long as she lives.

I am of the opinion that the same equity pertains here as in case of Milton *v.* Kite (supra), in which this course was pursued. The defendants, Davis Wheat and Fannie Key, feeling thus aggrieved by the judgment of this court, as herein indicated, have certified their intention of appealing. Therefore, the decree to be entered will contain a proviso that the same be suspended for sixty days, upon the execution by Davis Wheat and Fannie Key or either of them, or some one for them, of the usual suspension bond of usual security in the penalty of $200.00, within ten days, before the clerk of this court.